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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/587,377	04/30/2007	Erik Nilsson	1917	8312
20576	7590	04/27/2010	EXAMINER	
ALFRED J MANGELS 4729 CORNELL ROAD CINCINNATI, OH 452412433			SMALLEY, JAMES N	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/587,377

Applicant(s)

NILSSON, ERIK

Examiner

JAMES N. SMALLEY

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 January 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4 and 6 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4 and 6 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/22)
- Paper No(s)/Mail Date _____

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

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DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vlasaty et al. US 5,106,015 in view of Fujimoto US 5,551,629 and in view of Case US 1,685,147.

Examiner notes claim 1 properly invokes 35 U.S.C. 112, 6th paragraph for "means-plus-function" regarding the "mutually co-acting fastening means" and asserts the connection taught between the tube and the closure of Case '147 performs the same sealing/dispensing function in substantially the same manner.

Vlasaty '015 teaches a parallelepiped package comprising a square container, an opening including a tube (24a), and a closure element (27) disposed on a triangular surface (21). Regarding use of the container as a "beverage packaging unit," Examiner notes no structural features are being read into the term. The container of Vlasaty '015, while being disclosed for use with granular substances, is capable of being used in the intended manner as a beverage container. It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987). Furthermore, if a prior art structure is capable of performing the intended use as recited in the preamble, then it meets the claim. See, e.g., *In re Schreiber*, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997).

The reference, as applied, teaches all limitations substantially as claimed, but fails to teach the closure element being a generally pyramidal body, and also fails to teach the closure element having a cavity extending therethrough, which is rotated into alignment with an opening in the tubular part.

Fujimoto '629 teaches, in the embodiment of figure 8, a pyramid shaped closure for the opening of a rectangular container. One of ordinary skill in the art would recognize the closure is shaped to complete the rectangle at the corner.

Case '147 teaches it is known to form a closure cap, which is snap-connected to the tube, with a cavity extending therethrough, which is axially rotated into alignment with an opening in the tubular part, in order to dispense the container products.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the container closure of Vlasaty '015, forming it with a cavity extending therethrough, and forming the tubular part/spout with an opening, such that the cavity and the opening can be rotationally aligned for dispensing, or misaligned for sealing, as taught by Case '147, motivated by the benefit of allowing a user to dispense the container contents, and reseal the container, with fewer rotations.

Furthermore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the closure cap of Vlasaty '015, forming it in the shape of a pyramid, as taught by Fujimoto '629, motivated by the benefit of completing the entire shape of the square/rectangular shaped container, motivated by the benefit of presenting the completed whole shape as an aesthetic to the consumer. A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47.

The Supreme Court in *KSR* reaffirmed the familiar framework for determining obviousness as set forth in *Graham v. John Deere Co.* (383 U.S. 1, 148 USPQ 459 (1966)), but stated that the Federal Circuit had erred by applying the teaching- suggestion-motivation (TSM) test in an overly rigid and formalistic way. *KSR*, 550 U.S. at ___, 82 USPQ2d at 1391. Specifically, the Supreme Court stated that the Federal Circuit had erred in four ways: (1) "by holding that courts and patent examiners should look only to the problem the patentee was trying to solve " (*Id.* at ___, 82 USPQ2d at 1397); (2) by assuming "that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem" (*Id.*); (3) by concluding "that a patent claim cannot be proved obvious merely by showing that the combination of elements was obvious to try" (*Id.*); and (4) by overemphasizing "the risk of courts and patent examiners falling prey to hindsight bias" and as a result

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applying "[r]igid preventative rules that deny factfinders recourse to common sense" (Id.). In *KSR*, the Supreme Court particularly emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art," *Id.* at ___, 82 USPQ2d at 1395, and discussed circumstances in which a patent might be determined to be obvious. Importantly, the Supreme Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Id.* at ___, 82 USPQ2d at 1395.

Furthermore, the Supreme Court issued rationales which support the conclusion of obviousness, and which can be found in the MPEP 2141(III). Under rationale (A), it is obvious to combine known elements in a predictable manner. Under rationale (B), it is obvious to substitute a known device for another, with predictable results. Examiner asserts the combinations above are thus found to be obvious in view of the Supreme Court's rationales for finding of obviousness, as the obtained results of rotational dispensing, and forming a closure to complete the whole of a geometric shape, are predictable and lack an unexpected, synergistic result.

Regarding claim 2, the connection between the closure and neck of Case '147 is a snap-type connection, as the closure skirt (19) fits into recess (14), which has a lesser diameter than the upper portion of the spout (12), thus inherently requiring resilient distortion.

Regarding claim 3, Examiner notes Case '147, figure 2, wherein it can be seen the closure cap bottom surface seals on the spout top surface.

Regarding claim 4, Case '147 teaches rotating the closure and tube openings out of alignment in order to seal the container, as indicated by the "open" and "shut" arrows being diametric of each other.

Regarding claim 6, Examiner notes the closure of Case '147, figure 2, is in sealing abutment both with the opening of the tubular part (in the closed configuration, which is not shown, but would be given the contact between the bottom surface of the cap, and the top surface of the tubular member shown in the figure), and with the container shoulder, and thus it would be obvious to modify the closure cap of Vlasaty '015 such that the closure both seals the tubular opening, and is in contact with the triangular surface (21).

Response to Arguments

3. Applicant's arguments filed January 12, 2010 have been fully considered but they are not persuasive.

a) Applicant argues Fujimoto and Vlasaty fail to teach a cavity extending through the closure member.

Examiner disagrees with this assessment of Fujimoto. Noting figures 2, 7, 9 and/or 11, it is clear the closure is hollow. Furthermore, as the opening is located on the corner, there will inherently be a cavity within the closure, between a plane of the opening, and the corner of the closure.

b) Applicant argues that Fujimoto fails to teach a closure element having a triangular bottom surface.

Examiner notes such is not claimed. The claim only calls for the closure element to have "a bottom surface that overlies and conforms in shape with the triangular surface." Examiner asserts that such is not the same as "a triangular bottom surface. The closure of Fujimoto clearly conforms to the parallelepiped shape of the container, and would conform to the triangular surface already disposed on Vlasaty.

c) Applicant argues Fujimoto fails to teach the closure element being rotated to bring an opening into alignment with the tubular part.

Examiner notes this is why Case was cited. Examiner asserts one of ordinary skill would have found it obvious to combine the teachings of Fujimoto and Case, in order to provide a rotatable closure to align a dispensing opening with an opening in the tube, with a closure which is shaped to conform to the shape of the package.

d) Applicant argues there is nothing in the references to suggest combination.

Examiner asserts one of ordinary skill in the art would find it obvious to combine the references, because all deal with containers for dispensing products, and that a person of ordinary skill in the art would have found it obvious to combine benefits of Fujimoto (teaching it is obvious to complete the shape of a parallelepiped, which has an opening disposed at the corner, with a corner-shaped closure, and of

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Case, which teaches it is known to provide a dispensing closure which is snapped onto a tube, whereby rotation causes alignment of openings in order to dispense container products.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES N. SMALLEY whose telephone number is (571)272-4547. The examiner can normally be reached on Monday - Friday 10 am - 7 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on (571) 272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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3781

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